

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 24 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | 2 CA-CR 2012-0160 |
| |) | DEPARTMENT A |
| Appellee, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| RYAN ANTHONY POLITO, |) | the Supreme Court |
| |) | |
| Appellant. |) | |
| _____ |) | |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103103001

Honorable Christopher Browning, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and David A. Sullivan

Tucson
Attorneys for Appellee

Barton & Storts, P.C.
By Brick P. Storts, III

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Attorneys for Appellant

M I L L E R, Judge.

¶1 Following a jury trial, appellant Ryan Polito was convicted of disorderly conduct and possession of a weapon by a prohibited possessor.¹ The trial court sentenced Polito to concurrent, presumptive and mitigated terms, the longer of which was eight years. On appeal, Polito argues the court abused its discretion in admitting evidence police had found him in a motel room with a gun two weeks after the instant offenses occurred to prove he had access to a gun when he committed the instant offenses. He further argues that, without that evidence, the state produced insufficient evidence to sustain his conviction. Because the trial court did not abuse its discretion, we affirm.

¶2 We are required to affirm a trial court's ruling if legally correct for any reason. *See State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012). We review de novo the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). And we view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). At trial, the victim, C., identified Polito as the individual who had assaulted him on August 17, 2010, at a car wash in Tucson. At the time of the incident, C. was involved in a custody dispute regarding the three children he shared with Nicole Romero, who was Polito's girlfriend.

¹After the jury rendered its verdict finding Polito guilty of disorderly conduct, a lesser included offense of aggravated assault, the trial court proceeded with the trial on the weapons misconduct charge with the same jury. "A person commits disorderly conduct if . . . such person . . . [r]ecklessly handles, displays or discharges a deadly weapon or dangerous instrument." A.R.S. § 13-2904(A)(6). "A person commits misconduct involving weapons by knowingly . . . [p]ossessing a deadly weapon or prohibited weapon if such person is a prohibited possessor." A.R.S. 13-3102(A)(4).

¶3 C. testified that Polito had approached him at the car wash while holding a gun in his “right hand,” which he “pointed down,” rather than at C. C. also testified that he could “clearly” see the weapon, which he described as a “nine millimeter” gun that was “a dark color . . . black or dark gray.” When the prosecutor asked C. if he knew the difference between a revolver and a semi-automatic gun, C. responded, “Oh, yes, sir,” and described the weapon as a pistol that was square or “blocky” rather than “skinny.” C. testified that Polito had told him, “I have got no problem fucking shooting you” after he returned the gun to his own car. C. further testified, “[Polito] had a weapon in his hand. I thought he was going to shoot me.” Although Polito then tried to “start a fight” with C., C. did not respond, testifying that he reasoned, “[Y]ou got a gun in the car, your friend in the car . . . I’m really not trying to get shot over a dumb situation.” On cross-examination, C. testified he did not recall whether he had told the police the gun might be black or dark gray, rather than just black, or whether he had specified it was a nine millimeter firearm.

¶4 Polito left the car wash and C. called the police approximately one hour later. The police officer who responded to C.’s call, Andrew Lincowski, testified that although he noted most of what C. had told him, he did not “record word for word” everything C. had said. Referring to his police report, Lincowski testified that C. had told him the “black semi-automatic handgun” Polito had carried was “clearly visible,” and that Polito had said, “I don’t have a problem with fucking shooting you.” On cross-examination, Officer Lincowski confirmed that C. had described the gun as a “black” handgun. Police entered an “attempt to locate” order for Polito.

¶5 On August 31, 2010, two weeks after the incident at the car wash, police found Polito in a motel room in Tucson. Romero and her baby were also present. A gun was found inside Romero’s diaper bag. Polito was charged with aggravated assault, weapons misconduct, organized retail theft, theft, and possession of a narcotic drug.² The state filed a pretrial motion pursuant to Rule 404(b), Ariz. R. Evid., to offer “evidence that a handgun matching the description given by [the victim] was present at Defendant’s August 31st arrest . . . to prove that Defendant had access to such a weapon, and that he had the opportunity to use it against his victim.” Polito objected to the admission of “any evidence regarding that gun, because of the lack of the descriptive nexus” between the gun discovered in Romero’s diaper bag and the gun used at the car wash, as well as the absence of evidence establishing “that [Polito] knowingly possessed anything on the 31st.”

¶6 At a hearing two weeks before trial, the court indicated its belief that the “description of the gun” seized on August 31 was admissible under Rule 404(b) if the state satisfied certain foundation requirements. The court confirmed the substance of its earlier ruling on the first day of trial, provided that the state first was able to “handle [the] foundational hurdle” of showing “the victim can with some particularity describe the firearm that he alleges the defendant used in the aggravated assault on the 17th . . . and that firearm is similar to the firearm seized on the . . . 31st.” The court also required the

²The theft and drug charges were severed from this case prior to trial.

state to present “some evidence the defendant had actual or constructive control”³ of the gun at the motel. Neither counsel nor the court referred to Rule 404(b).

¶7 On the second day of trial, before the substantive direct examination of Detective Neal Ronald, the state asked if the court was “satisfied” it had met the foundational requirements to question the witness about the gun in the motel room. Polito again objected, based on “foundation and relevance,” arguing that by describing the gun as black rather than black and silver, C. had provided a “different description” of the gun and that Polito, who was not the father of Romero’s baby, “would have no interest in [Romero’s] diaper bag.” The court stated it was satisfied the state had met the previously imposed foundational requirements and noted that Polito’s concerns “go . . . to weight of the evidence, not admissibility.” As before, neither counsel nor the court referred to Rule 404(b).

¶8 Detective Ronald testified that on August 31, 2010, he had located Polito in a motel room in Tucson, along with another individual, Romero, and her “baby girl.” Ronald also testified a gun had been found in a diaper bag in the motel room and he believed the bag belonged to Romero. A photograph of the gun and the gun itself were admitted as evidence. Ronald described the gun as “dark gray on top . . . [and] black on

³Section 13-105(34), A.R.S., defines “[p]ossess” as “knowingly to have physical possession or otherwise to exercise dominion or control over property.” Dominion or control in the absence of actual physical possession has been characterized as constructive possession. *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972). Constructive possession exists when the prohibited property “is found in a place under [defendant’s] dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the [property].” *Id.*

the bottom. Barrel is black.” The state then played an excerpt from a September 7, 2010, telephone conversation between Polito and Romero in which Polito denied having a gun at the car wash.⁴

¶9 During the state’s closing argument on the portion of the trial related to the weapons misconduct charge, the prosecutor told the jury:

You must determine the facts only from the evidence produced in court. You should not guess about any facts. I will give you an example. This gun came into evidence yesterday. It was found in a motel room with the defendant. We don’t know that that’s his gun. You’re not to speculate whether or not that’s his gun. We don’t know if that was the gun that he was using that day when he threatened [C.]. So you’re not to guess about that.

But there are certain facts that you can infer from that. Which the defendant had access to the gun. [sic] He was in the same room with the gun. That gun looks very similar to the one that was described by the victim. These are things that you can infer. But the fact is, the State doesn’t prove that that was the defendant’s gun. So don’t guess about that.

...

As I said before, you’ve heard no testimony that it’s the defendant’s gun. But, he clearly has access to that firearm. He is in the same room with the firearm. He is found in that same room two weeks after this assault happens. And you can just take your own personal experience that people creatures of habit more likely if he has a gun two weeks later that he had a gun two weeks earlier when he is threatening the victim at the car wash? [sic] That is what you have to decide when you go back to deliberate.

¶10 On appeal, Polito argues the trial court erred in admitting evidence of the gun found in Romero’s diaper bag at the motel. The state responds that regardless of its initial introduction of the evidence under Rule 404(b), as relevant evidence with a proper

⁴The attorneys stipulated to the admission of this conversation.

foundational basis, there was no impediment to its admission. More specifically, the state argues the evidence about the gun at the motel was not evidence of a subsequent crime or other act. We agree.

¶11 The jury heard evidence from C. describing the incident at the car wash, including a description of the gun Polito held before he told C. he would have no problem shooting him. The testimony from Detective Ronald, as well as admission of the seized gun, was relevant to whether Polito possessed a weapon in the confrontation with C. *See* Rule 401.

¶12 Rule 404 concerns evidence offered to show a person's character that supports an inference he engaged in the conduct in question, which usually is prohibited in a criminal case. *See generally*, 1 Michael H. Graham, *Handbook of Federal Evidence* §§ 404:1 to 404:3, at 583-98 (6th ed. 2006); *see also State v. Coker*, 169 Ariz. 2, 4, 816 P.2d 261, 263 (App. 1991) (“[C]haracter evidence offered to prove action in accordance . . . inadmissible under Rule 404.”). Subsection b is a corollary to this fundamental principle that misconduct cannot be used for character or propensity purposes. *See State v. Ferrero*, 229 Ariz. 239, 241, 274 P.3d 509, 511 (2012) (“Rule 404(b) prohibits evidence of other crimes, wrongs, or acts to prove the defendant's character to act in a certain way.” (emphasis omitted)); *see also* Joseph M. Livermore et al., *Arizona Law of Evidence* § 404:2, at 147-8 (Rev. 4th ed. 2008). Here, the evidence concerning the gun at the motel was not offered to prove Polito's character or propensity, such as a proclivity to violent, threatening behavior. Instead, it was probative on the

issue of whether Polito possessed a gun to assault C. earlier, or, as Polito stated in the taped jail conversation, he merely threatened to engage in fisticuffs.

¶13 Even if we assume for the purpose of addressing Polito’s argument that the evidence about the gun at the motel was not admissible under 401, or failed to meet the requirements of 404(b), such error is harmless. The testimony was, at worst, irrelevant. Moreover, C.’s testimony regarding the gun was sufficient evidence to permit the jury to find Polito possessed a gun at the car wash. *State v. Munoz*, 114 Ariz. 466, 469, 561 P.2d 1238, 1241 (App. 1977) (“[A] conviction may be based on the uncorroborated testimony of the victim unless the story is physically impossible or so incredible that no reasonable person could believe it. [T]he jury believed the victim, and her testimony alone provides sufficient evidence to support appellant’s conviction.” (citation omitted)).

¶14 Although the record arguably contains conflicting evidence based on Polito’s statement during the taped telephone conversation that he did not have a gun (presumably, when he was at the car wash), it was up to the jury, as the fact finder, to assess the credibility of the witnesses. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). Similarly, to the extent Polito argues C.’s testimony was prejudiced because of Polito’s relationship with Romero, this too was a question of credibility for the jury. *Id.*

¶15 Polito also appears to argue the prosecutor’s comments during closing argument improperly placed his character in evidence in violation of Rule 404(b). “To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor’s misconduct ‘so infected the trial with unfairness as to make the resulting

conviction a denial of due process.’” *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). To the extent the prosecutor’s statement that people are “creatures of habit” constituted misconduct, the issue was forfeited by the failure to object. *See State v. Dickens*, 187 Ariz. 1, 20, 926 P.2d 468, 487 (1996) (claim of prosecutorial misconduct waived by failure to object at trial), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). Moreover, we find any possible error to be harmless. *See State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) (prosecutor’s statement improper but harmless given context in which made and overwhelming evidence of guilt).

¶16 Accordingly, we affirm Polito’s convictions and sentences.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.